No. 2640.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

WORTHEN LUMBER MILLS, a Corporation,

Appellant,

vs.

ALASKA JUNEAU GOLD MINING COMPANY, a Corporation,

Appellee.

BRIEF OF APPELLEE

Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

HELLENTHAL & HELLENTHAL,
Attorneys for Appellee.

CURTIS H. LINDLEY,
Of Counsel.

Filed this.....day of October, 1915.

....., Clerk.

By....., Deputy Clerk.

THE JAMES H. BARRY CO.

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STATEMENT OF FACTS.

This suit was brought to enjoin the driving of piles and the construction of a platform designed for use in piling lumber on the tide flats lying on the shore of Gastineau Channel, near Juneau, Alaska.

The appellee is the owner of a large quartz mine situated about four miles inland from the shore of

Gastineau Channel, in the immediate vicinity of Juneau, Alaska. This mine has been operated for many years. Until recently, however, these operations were carried on with a view largely of exploring and developing the ore bodies. In the year 1909, the work of development and exploration had been carried to such an extent as to warrant the erection of a large milling plant. Accordingly, steps were taken at that time looking toward the installation of such a plant.

Climatic and operating conditions make it imperative that these large milling plants used in connection with the crushing of low grade ores mined and milled in Alaska should be built at tidewater. This for many reasons which readily suggest themselves, but more especially to secure cheap transportation, without which low grade mining cannot be carried on. These circumstances led to the purchase by the appellee of the Abe Lincoln and General Grant lode mining claims situated on the shore of Gastineau Channel, immediately south of the City of Juneau.

These claims had been located at an early date and were at one time the property of the J. P. Jorgenson Company, W. W. Casey, John Reck and W. J. Hills. While the claims were so owned, the first named, J. P. Jorgenson Company, conveyed its interest to its co-owners, reserving to itself, however, a strip of water front extending along the shore of Gastineau Channel in front of the claims for a distance of one thousand feet, and particularly described in the deed

of conveyance. Its co-owners at the same time conveyed to it their interest in the strip of water front just mentioned. These conveyances were executed in the year 1902, and immediately thereafter, the J. P. Jorgenson Company, commenced the erection of a sawmill upon the thousand foot strip of water front so reserved by it. The sawmill, so constructed, was operated by the J. P. Jorgenson Company for several years. In about the year 1910, the name of the Company was changed to the Alaska Supply Company, but the operation of the mill was continued by the same corporation under its new name until the year 1913, when the Worthen Lumber Mills, the appellant, became its successor in interest.

In the meantime the title to the Abe Lincoln and General Grant lode claims had become vested by mesne conveyances in John Reck and one Henry Shattuck, the latter having also become the principal stockholder and the president of the J. P. Jorgenson Company, the name of which had been changed to that of Alaska Supply Company.

In August, of the year 1911, while Henry Shattuck stood in this relation to the Alaska Supply Company, the appellee purchased from him and his co-owner, John Reck, the General Grant claim, it being the claim which embraces within its boundaries the upland lying above the tide land in dispute. Shortly prior to this, however, the claim purchased had been declared to be non-mineral in character by the Land

Department in proceedings before that tribunal upon an application for patent previously made. Accordingly the appellee, in addition to acquiring the interests of the former owners, also caused a group of millsites to be located for it, covering the ground embraced within the claims. The "A" Millsite, one of the group so located, and the millsite within the boundaries of which practically all the upland lying above the tide land in controversy is embraced, was located during the year 1911. The "U" Millsite, designed to cover a small fraction, and embracing within its boundaries a few feet of the upland lying above the tide land in dispute, was located by the appellee about two years later.

At the time of the purchase of the General Grant claim by the appellee and at the time of the location of the millsites, certain Indians named Jimmie Bean and Jimmie Johnson, respectively, claimed a possessory right under the Act of May, 1884, to two adjoining tracts embracing the uplands lying above the tide lands in controversy, and also the tide lands themselves. The right and title of both of these Indians, to both uplands and the tide lands, were also purchased by the appellee and conveyed to it by deed.

A small plat showing the relative positions of all the tracts referred to with reference to the tide land in dispute is embodied in the findings of the lower court, and is contained in the record at page 48.

The area so acquired by the appellee and em-

braced within the Abe Lincoln and General Grant claims and the group of millsites and Indian tracts which cover practically the same ground covered by the mining claims, constitutes the site for appellee's large milling plant, the first unit of which now under construction is to have a capacity of eight thousand tons per day, to which is to be added another unit, bringing the total milling capacity of the plant when completed up to twelve thousand tons per day. Work looking towards the erection of this plant was commenced on this site in the summer of 1911, and was carried on continuously ever since, a sum in excess of one million dollars having been expended in that connection. (See Evidence Bradley, Record, p. 140, *et seq.* Evidence Lindsay, Record, p. 174, and Evidence Wayland, Record, p. 177.)

In the summer of 1912, while the appellee was carrying on active construction work on its millsites, the city of Juneau built a plank roadway over the tide flats, then occupied and claimed by appellee's Indian grantors, in front of the "A" and "U" millsites, in such a manner as not to interfere with or cut off access to deep water. (See Finding of the Court, No. 9, Record, p. 50. Evidence Bradley, Record, p. 202.)

This roadway was constructed by the city without obtaining any right or title to the ground over which the roadway was constructed, from the appellee or any one else, and without obtaining any permission what-

soever to construct the roadway. (See Finding No. 9, Record, p. 50, and Evidence Bell, Record, p. 192.) The roadway was not built along the line of ordinary high tide, but was built over the beach a considerable distance below the ordinary line of high tide, so that the roadway did not embrace within its boundaries any of the upland lying along the shore. (See Finding No. 9, Record, p. 50, and plat forming part of the finding of the Court, occurring on page 48 of the Record. Also stipulation occurring on page 169, Alaska Juneau Company, Exhibit "Y".)

In the year 1912, also, the Alaska Supply Company, then under the management of Mr. Henry Shattuck, who had in the previous year conveyed the General Grant lode claim to the appellee, extended its log boom beyond the one thousand foot reservation by driving ten piles, driven in pairs, so as to form five dolphins approximately fifty feet apart. During the same year also, the Alaska Supply Company drove seventeen piles, approximately along the line of the street constructed during the same summer. (See Evidence Webster, Record, p. 84, *et seq.*) Up to this time no piles of any character had been driven on the tide lands in dispute. (See Evidence Webster, Record, p. 84 *et seq.*)

During the following year, a few days prior to the commencement of this suit, the appellant commenced to drive piles and lay a platform along the outer edge of the road previously built by the city, with the

view of providing itself with a place to store and pile its lumber. Shortly after this work was commenced and before it had progressed very far, this suit was brought to enjoin the appellant. A temporary injunction was asked for and granted, and upon the trial the same was made permanent, it being shown that plaintiff was the owner of the upland and had acquired from the Indians their possessory title to the tide land claimed under the Act of May 17, 1884, and was carrying on operations of such a nature that access to deep water was required along the entire strip of four hundred feet in dispute in order to land supplies and other materials, that the construction of a wharf over the shoal water lying between the upland and the deep water of Gastineau Channel was necessary in this connection, and further, that the platform about to be constructed by the appellant would cut off this access to the deep water of Gastineau Channel. From the decree granting this injunction the appeal was taken to this court.

APPELLANT'S EXCEPTIONS.

At the outset it is to be observed that the exceptions taken to the findings of fact and conclusions of law sought to be reviewed by this appeal, do not in any case point out the reason for the making of the objection or the taking of the exception. The language of

the exceptions appearing on pages 209-210 of the Record is as follows:

> "Defendant also duly excepted to each of the third and fourth findings of fact filed herein and to the following portion of the Court's Finding No. 2, to wit: (Then follows a portion of Finding No. 2).
>
> "Defendant also excepted to that portion of the Court's Finding No. 2, reading as follows, to wit: (Then follows a further portion of Finding No. 2).
>
> "Defendant also excepted to that portion of the Court's Finding No. 9, reading as follows, to wit: (Then follows a portion of Finding No. 9).
>
> "Defendant also excepted to each of the Court's conclusions of law.
>
> "Defendant also excepted to the decree entered herein."

As a general proposition, findings of the lower court will not be disturbed on review where there is any evidence to support them. See

> *Empire State-Idaho M. & D. Co.* v. *Bunker Hill O'Sullivan M. & C. Co.*, 114 Fed., 417;
> *Los Angeles Gas & Elec. Corp.* v. *Western Gas Constr. Co.*, 205 Fed., 707-714.

Under the Act of April 28, 1915, enacted by the Territorial Legislature of Alaska, findings of fact in equity cases are made reviewable, but they are reviewable only when proper exceptions have been taken. The act provides:

> "But such findings of fact and conclusions of law shall be separate from the judgment and shall be

> filed with the clerk and shall be incorporated in and constitute a part of the judgment roll of the case, and such findings of fact shall be subject to review by the appellant tribunal, and may be amended to conform to the evidence. Exceptions may be taken during the trial to the ruling of the Court and also to the findings of fact and a statement of such exceptions prepared and settled as in an action, and the same shall be filed with the clerk within ten days before the entering of the decree, or such further time as the Court may allow."

It will be seen therefore that while the action of the court in making findings is made reviewable, it is reviewable only when exceptions are taken to the findings and a statement of such exceptions is prepared and settled as in the act provided.

Only rulings upon matters of law when properly presented in a bill of exceptions can be considered here in addition to the question where the findings are special whether the facts found are sufficient to sustain the decree of the court. The mere statement that the party excepts to a finding is not sufficient. The object of an objection and an exception is to call the attention of the trial judge to the alleged error in order that he may, if an error has been committed, upon his attention being specially directed to it, correct the error. It is for this reason that only those things which were objected to at the trial and duly excepted to can be reviewed on appeal. To state merely that a finding is excepted to does not direct

the court to the error, if any, but merely advises the court that the party excepting is not satisfied with the finding. This the court would assume to be the fact without such exception if the finding were adverse to the party seeking to take the exception. This matter has been frequently passed upon by both State and Federal courts.

Webb v. *National Bank of Republic,* 146 Fed., 717-719.

Exception here was as follows:

> "To each, all and every of said findings, conclusions and judgments the plaintiffs and each of them at the time except."

The court in holding this exception invalid, speaking through Judge Sanborn, said:

> "The purpose and office of an exception is to sharply call the attention of the trial court and opposing counsel, to the specific ruling or finding challenged, to the end that the Court may at once correct it if it is erroneous. An exception which does not give this notice of the specific error claimed, utterly fails to perform its function and is futile. The exception here is of this nature."

Collier v. *Erwin,* 2 Mont., 335-336:

The exception here was general, being "to the findings of the court." The court held this open to two objections:

1. The exception was general to all the findings,

so if any one was correct, the exception would have to be overruled;

2. The exception did not specifically point out wherein the findings were erroneous.

With reference to the second objection, the court say:

> "It may also be observed that an exception to a finding of fact should point out specifically wherein the finding is erroneous. This exception has no pretention of this kind."

Benefiel v. *Aughe,* 93 Ind., 401, 403:

The exception was in the following terms:

> "The defendants object to the findings and the decree herein."

It was held that this objection was too general to present any question and, quoting from a previous decision by the same court, *State* v. *Swarts,* 9 Ind., 221, it was said:

> "A general objection, either to finding or to verdict, without stating why, amounts to nothing."

Schmitt v. *Miller,* 22 Mich., 278-279:

The exception here was as follows:

> "The said plaintiff, by her attorney, hereby files in said cause her exception to the findings, decision and judgment of Hon. Charles R. Brown, the Circuit Judge, who tried the above cause."

In deciding that under this exception the court could not inquire as to whether there was evidence to support the finding, the court say:

> "As to the first question, there was no such sufficient objection as would be sufficient to present it."

Hunter v. *Manhattan Ry. Co.,* 36 N. E., 400, 401:

The exception to the findings in this case was as follows:

> "To the third finding of fact and separately to so much thereof as finds that plaintiff ever took from her co-tenant an assignment for valuable consideration of any rights of action as herein stated."

In holding that in this form of exception no question is presented which is subject to review, the Supreme Court of New York say:

> "The exception is too general to be available in the present manner. The finding is very comprehensive as to facts and their legal effects, and the exception fails even to suggest the defect in proof now relied upon."

Paggeot v. *Sexton,* 23 Wis., 195, 196:

The exception in this case was in the following language:

> "The plaintiffs except to each and every finding of fact and facts in said written finding of the judge contained."

In passing upon its sufficiency the court say:

> "Within the decisions both of this court and the court of New York, such an exception amounts to nothing."

It was urged in this case that there was a distinction between law and equity cases in this regard, but the court held that no such distinction existed.

APPELLANT'S BRIEF.

The various propositions referred to in appellant's brief will be discussed in the order in which they occur.

A discussion of considerable length relating to appellee's title is indulged in by counsel for appellant under the head "Appellee's Title."

While this portion of counsel's brief may be very interesting, the discussion is entirely academic, for clearly, if the plaintiff has a good title to the upland in question, it becomes quite immaterial from what source this title is derived.

When the appellee's present millsite was selected by it as the site upon which to construct its milling plant the ground was covered by two lode locations, the Abe Lincoln and the General Grant, the portion of the millsite lying above the tide land in dispute being covered by the General Grant. Negotiations were had looking toward the purchase of these claims and while these negotiations were pending, the claims were declared non-mineral by the Department. (See

Evidence Reck, p. 168.) The appellee, however, purchased the claims and paid the claimants for them. At the same time a group of millsites were so located by the appellee as to embrace this same area. That done, it was found that certain Indians laid claim to portions of land along the beach and embraced within the lode claims and the millsites and also to the tide land lying in front thereof. Thereupon the claims of these Indians were purchased and paid for by the appellee.

It was shown upon the trial and found by the court that appellee commenced construction work on its millsite in the summer of 1911. Counsel is in error on page 10 of the brief in asserting that the "A" Millsite was not actually occupied for millsite purposes till after the street was built in the year 1912. The testimony is that work was commenced on this entire group in 1911, and that the work so commenced was carried on continuously ever since. (See Evidence Bradley, Record, p. 140 *et seq.;* Evidence Lindsay, Record, p. 174, and Evidence Wayland, Record, p. 177.)

The testimony with reference to the Indian title is entirely undisputed, and is to the effect that prior to and on May 17, 1884, two Indians named Jimmie Bean and Jimmie Johnson occupied two separate tracts lying side by side and so situated as to embrace all the upland lying above the tide land in dispute, and that in addition to this, the Indians named occupied

and used the tide lands in front of their uplands in connection with the landing of canoes and other water craft, having improved the same by removing the boulders so as to make them available for this purpose. These Indians, according to the testimony, occupied an asserted claim to these uplands and tide lands from a time prior to the Act of 1884 up to the time that they disposed of their holdings to appellee. (See Finding No. 4, Record, p. 44; Evidence Fannie Johnson, Record, p. 133; Evidence Jimmie Johnson, Record, p. 129; Evidence St. Clair Johnson, Record, p. 112; Evidence Tom Johnson, Record, p. 124.)

Appellant's counsel, on page 10 of the brief, under the head "Indian Title," says that he is disposed to accept the consequences of the finding in relation thereto, and to treat it as binding upon this appeal. But whether this is to be construed as an admission that the finding is correct or not is not important in view of the fact that the evidence upon the matter referred to is uncontradicted and is clear and unqualified. It becomes immaterial, therefore, to further inquire into the sources of appellee's title, since it cannot be denied that it has a good title, arising from one of three sources. The contention of counsel that the Indian rights under the Act of 1884 are not assignable will be referred to later when that question is specifically taken up and the other contentions enumerated in the statement of facts by appellant's counsel will be treated in the same manner.

We will next proceed to reply to the argument contained in appellant's brief, taking up each subdivision in its order.

I.

Under the title, "The Street Cuts Off Littoral Rights," appellant's counsel endeavors to show that the plank street or walk extending over the tide flats in front of plaintiff's upland deprives plaintiff of its right of access to the deep water of Gastineau Channel.

The right of access to deep water is a right that inures to the benefit of the rightful possessor of uplands, who is given this right in order that he may be enabled to reach the navigable waterway from the uplands in his possession. The upland owner or possessor has this right of access regardless of the extent of his upland holdings. He may have a large area of land lying back from the shore, or he may be possessed only of a very narrow strip. If the land borders upon the water's edge; that is to say, if his land is bounded by the line of ordinary high tide he is in possession and occupancy of the upland, and because of this is entitled to have access to the navigable waters lying in front of him. If a city, county or municipality acquire the right to construct, and maintain a highway along the shore, such city, county or municipality will, upon construction and maintenance of such highway, become the upland possessor or owner. It will possess the land that borders on the navigable water and the

person owning land above such highway will cease to be the littoral owner. He will no longer have possession of lands that border upon the line of mean high tide. The right of possession of the land so situated will be in the owner of the street or highway, and the owner of such street or highway will, because of the ownership of the street which embraces the upland, have the same rights of access to the navigable waters lying in front of such upland that the owner of any other species of upland has. The right of the public when entitled to the use or possession of a street or highway bordering upon navigable water to free and unobstructed access to such navigable water rests upon the same foundation that the right of any other upland owner rests. When a street is properly and rightfully laid out and maintained along the shore of a navigable body of water, it will be assumed that the object in laying it out along the shore of such navigable body of water was to secure to the public the right of access, but this right itself does not depend upon any peculiar property that exists in the street or highway, but it finds its origin in the fact that the public so having the right of possession to the upland has the right of access to the waters lying in front of such upland for the same reason that any individual having the same right of possession to the upland would have the same right of access.

It was so held by this court in the case of

McCloskey v. *Pacific Coast Company,* 160 Fed., 794.

There can be no doubt of the correctness of the decision of this court in that case. However, the rule that the public as the possessor of a street extending along the shore becomes vested with the right of littoral holders has no application to the facts in the case at bar, for the following reasons, namely:

First: The city of Juneau laid out and constructed the street or plank roadway without acquiring the right so to do from any one and without regard to the rights of the upland owners and possessors:

Second: The street as constructed is wholly on the tide flats, the uppermost side of the same being several feet below the line of mean high tide, so that the city as the possessor of the street is not in possession of any of the upland, i. e. is not a littoral holder:

Third: The street was constructed in front of plaintiff's upland upon the tide flats in such a manner as not to interfere with plaintiff's access to deep water, but rather to facilitate such access.

In regard to the first proposition, the lower court found that the plaintiff did not consent to or give the city any right whatsoever to construct said road, but that the same was constructed without consulting the

plaintiff. This finding of the lower court is amply supported by the testimony. The witness Bell testified that the plank road or street in question was constructed by the city in the year 1912; that during that year he was a member of the city council; that the city council at that time had two surveys made, one along the tide flats, and one further up over the upland, but concluded to build the street over the tide flats because it could be more cheaply constructed along that line. That the street was constructed without any reference to any previous survey or any ordinance previously passed and without any negotiations with the Alaska-Juneau Gold Mining Company, and without any permission whatsoever from said company. In fact the witness testified that the city had no agreement with any one, that the street was simply built without discussing the matter at all. (See evidence Bell, Rec., pp. 191, 192, 193). Clearly a municipality has no right arbitrarily, without any process of ceremony and without compensation, to deprive an upland owner of his right of access to deep water, a property right which is as sacred as any other.

McCloskey v. *Pacific Coast Company,* 160 Fed., 794;
Yates v. *Milwaukee,* 10 Wallace, 504.

In the former case this court very carefully inquired into the question of whether the city had a legal right

to maintain the street before deciding that the Pacific Coast Company had ceased to be a littoral owner because of its existence so that the littoral right of access belonged to the public and not to the Pacific Coast Company. This court clearly deemed that question to be one that must first be decided in favor of the public before it would be accorded the rights of littoral holders as the possessor of the street.

According to the facts in the latter case, one Yates had built a wharf extending into the Milwaukee River. The city of Milwaukee had declared the same a nuisance and was proceeding to tear it down in connection with work done by it in dredging the river and widening its channel. Yates brought suit to enjoin the city. The court held that Yates as the riparian holder, had a right to build a wharf, and that the city had no right to condemn it or tear it down without compensation. The court say:

> "But whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream, and among those rights are, access to the navigable part of the river from the front of his lot, the right to make a landing, wharf or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be. . . . This riparian right is property and is valuable, and though it must be enjoyed in due subjection to the rights of the public, it can not be

> arbitrarily or capriciously destroyed or impaired. It is a right of which when once vested the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation."

In relation to the second proposition that the street as constructed is wholly on the tide flats, the lower court found as follows:

> "The Court further finds that in the year 1912, and while the plaintiff was the owner of the upland lying between the lower or southerly end of the Jorgensen thousand-foot reservation and the Alaska Juneau wharf, the City of Juneau constructed a plank roadway over the tide-lands lying in front of plaintiff's said upland, having an approximate width of twenty feet; that said roadway was built on piles and not along the line of mean high tide, but wholly over the beach or shore land several feet below the line of ordinary high tide" (see Finding No. 9, pp. 49-50).

The correctness of the Court's finding in this regard is not challenged. It was stipulated upon the trial that the line of ordinary high tide was correctly shown on Alaska Juneau Company's Exhibit Y (See Rec., p. 169), and Exhibit Y shows the line of ordinary high tide in front of the upland lying above the tide land in dispute, as being a considerable distance above the street. This being true, the city, even though in rightful possession of the street, would nevertheless not be an upland or littoral owner or possessor, a littoral owner or possessor being one whose lands border upon

navigable water. The plaintiff was as much a littoral owner and possessor after the construction of the street as it was before the street was constructed. The placing of the street along the tide flats did not deprive the plaintiff of the possession of the land, the lower boundary of which was Gastineau Channel. In building the street, the city merely placed the structure on the tide land in front of the littoral owner's land, a structure which, as we shall hereafter see, would be ordered removed at the suit of the appellee if it interfered with the littoral possessor's right of access, otherwise not.

This precise point was before the Supreme Court of the United States, in the case of

Illinois Central Ry. Co., v. *Illinois*, 146 U. S., 387.

This case arose in the state of Illinois. The city of Chicago was the owner in fee simple of a street lying along the shore of Lake Michigan. The street was so situated upon the upland that its lower boundary was the line of ordinary high water. The city had, by ordinance, given the Illinois Central Railroad Company the right to fill in the lake along the shore between the street so owned and held by the city and deep water, so as to reclaim a tract 300 feet in width and extending to a point indicated in the ordinance. This strip had been filled in and was occupied by the railroad company in connection with the laying

and maintenance of its tracks and other appliances. The railroad company laid claim not only to the 300 foot strip lying in front of the city's upland holdings, but also the right to extend out to deep water from the seaward side of this strip. It claimed this right not only because of the city ordinance but also because of a grant by the legislature, which had been subsequently revoked, the suit involving among other things the railroad company's right to maintain structures to the seaward of the 300 foot strip, and the court held that the railroad company did not have the right to maintain its improvements either under the grant from the legislature or under the grant from the city council, that under the laws of Illinois, the city council had the power to give the railroad company the right to fill in and use the strip 300 feet wide along the water front, but that notwithstanding the fact that the city council had such power and the further fact that the railroad company had exercised the right granted by the city council and had filled in the ground and had occupied the same, the city, being the owner of the street along the shore in fee simple, was vested with all the rights of a riparian proprietor and was not divested of those rights by reason of the fact that the shore had been filled in and occupied by the railroad company under the ordinance. It was accordingly held that the right of the city to wharf out to deep water beyond the strip that had been filled it remained and continued to exist

notwithstanding the ordinance and the occupancy of the strip thereunder by the railroad company. In the course of the opinion, the court say:

> "The construction of a pier, or the extension of any land in the navigable waters for a railroad or other purposes by one not the owner of lands on the shore does not give the builder of such pier or extension, whether an individual or corporation, any riparian rights. These rights are incident to riparian ownership; they exist with such ownership and pass with the transfer of the land, and the land must not only be contiguous to water but in contact with it. Proximity without contact is insufficient. The riparian right attaches to the land on the border of navigable water without any declaration to that effect from the former owner, and its description in a conveyance by him would be surplusage."

Applying the law as laid down by the Supreme Court in this case to the facts in the case at bar, we have this situation. Here the appellee occupies the same position that the city of Chicago did in the case under discussion. There the city of Chicago owned the fee to the upland because of its ownership in fee of the street which bordered on ordinary high water. Here the appellee owns the upland because of its ownership of the land which is bounded by ordinary high water. There, the railroad company, under a grant from the city itself, occupied a strip 300 feet in width between the upland and deep water. Here, the city, without any grant or right from the upland

owner (the appellee) occupies a strip 20 feet in width between the appellee's upland and deep water. The appellant occupies the same position that the Illinois Central R. R. Company did in the case under discussion, except that the Illinois Central R. R. Company occupied the 300 foot strip originally because of the grant to it by the city, while in the case at bar, the city is possessed of a strip 20 feet wide without any grant or right. Except for this last mentioned feature, the cases are parallel. Yet the Supreme Court held that the grant to the Illinois Central R. R. Company, followed by its occupancy of the 300 foot strip granted, did not deprive the city as the shore owner, of its right to wharf out and have access to the deep waters of the Lake, giving as a reason therefor,

> "That the construction of a pier or the extension of any land in the navigable waters for a railroad or other purposes by one not the owner of lands on the shore, does not give the builder of such pier or extension, whether an individual or corporation, any riparian rights. These rights (say the court) are incident to riparian ownership."

The railroad company in that case was not the riparian owner, but the mere occupant of land between the upland and deep water; so the city in this case is not the riparian owner or holder, but the mere occupant of a strip of tide flat between the upland and deep water.

The city, in that case, was the owner of the upland bordering on the navigable waters, and as such had the right of access to deep water and the rights incident thereto, including the right to wharf out. The appellee in this case is the owner of the upland and because of this is entitled to the same rights that the city of Chicago as the owner of the upland was held to be entitled to by the court, and the views expressed by the Supreme Court in that case are in entire harmony with the decision of this court in the case of *McCloskey* v. *Pacific Coast Co.,* 160 Fed., 794. In that case the Pacific Coast Co. was denied the right of access to deep water because it was not the littoral owner, since the street followed the shore in such a way as to occupy five feet of the upland above ordinary high water mark. This of course made the owner of the street the littoral proprietor and holder, while in the case just discussed the city of Chicago remained the littoral proprietor, notwithstanding the occupation of a strip of land lying below ordinary high water by the railroad company, and while in the case at bar the appellee now is and remained the littoral owner and holder notwithstanding the existence of the plank roadway or street over the tide flat in front of its upland holdings.

This matter is referred to in the opinion of this

court in the case of *McCloskey* v. *Pacific Coast Co.*, at page 797, where the court say:

> "But we do not find that the appellee is in fact a littoral owner . . ."

With reference to the third reason urged why the existence of this plank road or street does not interfere with appellee's right of access, the court held as follows:

> "That the construction and maintenance of said street does not, and never did, interfere with any of the plaintiff's rights, and that it is so constructed that the plaintiff can wharf out and have access to deep water, notwithstanding said plank road" (See Finding No. 9, Rec., p. 50).

This finding is based upon the uncontradicted testimony of the witness P. R. Bradley (Rec., p. 202).

In view of the fact that the street or roadway does not now, and never did, interfere with plaintiff's access to deep water, appellee can not now, nor could it at any time, maintain a suit to enjoin the city from maintaining the street in its present position, nor could it have prevailed in a suit against the city brought to prevent the construction of such a street or roadway.

Courts will not enjoin the construction and maintenance on every kind of structure on the tide flats at the suit of the upland owner. The upland owner's right consists of the right of access to deep water, and

unless this right is interfered with by the maintenance of a structure on the tide flats in front of him, he has no right to complain. It was so held by this Court in the case of *Decker* v. *Pacific Coast Co.,* 164 Fed., 974.

It is difficult to see, therefore, how the appellee could lose its right of access from its upland because of the construction of a street by the city without its consent under circumstances such that the appellee was powerless to prevent the construction of said street.

> *Barron* v. *Alexander,* 206 Fed., 272;
> *Decker* v. *Pacific Coast Co.,* 164 Fed., 974;
> *Columbia Canning Co.* v. *Hampton,* 161 Fed., 60.

It is not necessary to argue that the city could not commence the construction of a roadway on the tide flats in front of appellee's upland in such a way that if appellee brought suit to enjoin such work of construction, it would be a perfect defense to say that the appellee's right of access was not interfered with, and that therefore it had no cause of action, and then upon completion of the work open up the street or highway and say to appellee, now, notwithstanding the fact that you could not prevent the construction of this roadway or highway, because it is so constructed that your access is not interfered with, you now have lost your right to avail yourself of this access entirely, because

the public now has that right from the street, and any trespasser may construct a wharf to the seaward of this street, and in an action brought by you to enjoin the construction thereof, it will be a perfect defense to show that the city constructed the street over the tide flats in front of your property without your consent, without giving you any compensation, and under such circumstances that you could not have brought a suit to enjoin such work of construction. To state this proposition is to refute it.

II.

Under subdivision II, counsel discusses the proposition that a private individual is not entitled to redress against a public wrong. As a general proposition this may be conceded, although it has no application whatsoever to the case at bar.

Counsel in his brief asks why appellant would not have the same right to restrain the appellee from constructing a wharf that the appellee has to restrain appellant? The answer is that aside from the fact that the appellee has succeeded to the possessory rights of the Indian grantors to the tide lands, appellee is a littoral holder who has, because of its littoral occupancy and ownership, the right of access to the navigable waters lying in front of its upland, and because of this is entitled to an injunction against any one interfering with or obstructing its access. The appellant on the other hand, is a naked trespasser, whose

predecessors in interest conveyed by deed the upland above the tide land in dispute to the grantors of the appellee, and who is now, without any claim of right, attempting to cut off the access to deep water so conveyed to appellee's grantor as an appurtenance to the upland, by endeavoring to take advantage of the act of the city of Juneau in attempting to construct a street or roadway over the tide flats without first obtaining the right to do so.

III.

Under the heading "Indian Titles Not Alienable," counsel indulges in a discussion to show that the possessory rights held under the Act of May 17, 1884, can not be alienated.

At the outset it must be noted that possessory rights under the Act of May 17, 1884, are not Indian titles. While in this case, it is true that the grantors of the appellee were Indians, the rights conveyed would have been the same if the grantors had been of the white race, provided of course that they had, like the Indians referred to, occupied and claimed the ground prior to and since the enactment of the Act of May 17th, 1884. That act provides, among other things:

> "That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress."

The meaning of this language is readily understood when read in the light of current history. Prior to the 17th of May, 1884, all lands in Alaska were public, the property of the United States, and no law had ever been enacted under which title to any kind of land could be acquired in the Territory. From the earliest times, both Indians and whites had settled upon the public lands of the United States and had occupied certain portions of them for a variety of purposes. At the time of the passage of the Act in 1884, there were in Alaska not only a number of Indian settlers of this character, but a large number of whites had domicile there, settling here and there, and occupying such portions of the public domain as they required in order to carry on their respective pursuits.

While there was not at such time a law under which title to the tracts so settled upon could be acquired, the settlers occupied these lands with the tacit consent of the United States, in the same manner and under the same circumstances that the early settlers in California and other western states occupied, appropriated and improved the public domain. The titles of these early settlers to the extent of the land actually occupied, possessed and claimed by them were always regarded as valid as against any person whatsoever excepting the United States. The rights acquired under such possession were looked upon in the same manner as were other property rights. The courts protected

the possession of the first-comer and appropriator, and it was uniformly held that the possessor of these tracts throughout the entire West, whether in Alaska, California, or some other locality along the Pacific Coast, could maintain ejectment against an intruder; that these possessory titles could be conveyed by deed, pass by descent, and in fact had all the qualities of a fee simple title as against every person whatsoever except the United States.

When the Act of 1884 was passed, the mining laws were extended to Alaska. If Congress had stopped here, there would be nothing to prevent a discoverer of mineral upon land previously occupied by another, whether such other were an Indian or a white person, from locating the same, and by connecting himself with the paramount title of the United States, dispossess the earlier settler and deprive him of the rights he had acquired with the tacit consent of the United States. Obviously this would work an injustice. Accordingly a proviso was inserted in the act, providing:

> "That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress."

The proviso just quoted did not confer upon either the Indians or other persons in possession of lands in Alaska any new rights, but merely protected and recognized the rights previously acquired by the tacit consent of the United States. The operation and effect of the proviso, to all intents and purposes, is like that of the mining law passed in 1866. This law conferred no new rights upon the miners in California and other western states, but merely recognized the rights previously acquired. So likewise the proviso in the act under discussion did not grant to those early settlers any new rights, but merely recognized the rights they already had, and protected them against intrusion by others, it being at the time provided that the terms under which such settlers might acquire title were reserved for future legislation by Congress.

Prior to the enactment of May 17, 1884, the possessory rights of these various occupants and claimants were freely transferred by deed, and the right of an occupant of the land on the public domain to alienate his possessory right was never questioned. The object of Congress in inserting the proviso above referred to in the Act of 1884 was not to limit, qualify or curtail the rights of those occupants, but to protect them and to recognize them. It was a mere recognition of pre-existing rights, and one of those pre-existing rights was the right of the possessory claimant to alienate his possessory title. This right to alienate a possessory

title claimed under the Act of 1884 was recognized by this court on two separate occasions.

> *Heckman* v. *Sutter,* 119 Fed., 83; and
> *McCloskey* v. *Pacfic Coast Co.,* 160 Fed., 794.

In the case of *Heckman* v. *Sutter,* an Indian named Charles Dickson had settled upon and had occupied certain upland and used the tide land in front thereof prior to and on the 17th day of May, 1884. In the year 1888, the Indian, Dickson, sold to one Barry his possessory right, and Barry afterwards sold to Sutter. On appeal, this Court held that Sutter, as the successor in interest of the original Indian, Charles Dickson, had the right of occupancy not only to the upland settled upon by Dickson, but also because of his use and occupancy thereof, to the tide land lying in front thereof.

In the course of the opinion, the Court, in discussing the proviso above quoted, uses this language:

> "The prohibition contained in the Act of 1884 against the disturbance of the use or possession by any Indian or other person of any land in Alaska claimed by them is sufficiently general and comprehensive to include tide lands as well as lands above high water mark, nor is it surprising that Congress, in first dealing with the then sparsely settled country, was disposed to protect its few inhabitants in the possession of lands of whatsoever character, by means of which they eked out their hard and precarious existence."

In the case of *McCloskey* v. *Pacific Coast Co.,* one Murray, a white man, had located and claimed title to the lands in dispute in that case, prior to and on the 17th of May, 1884. The possessory right of Murray had been subsequently acquired by the Pacific Coast Co., and the Court held that his successor was entitled to the use and occupation of the ground originally located and claimed by Murray, including both upland and the tide land.

The contention of counsel that because Congress subsequently passed a number of laws under which title to various kinds of land in Alaska may be acquired, the right recognized by the Act of 1884 became extinguished is without merit. Even though the Indian claimant, or his successor, might have acquired title under one or the other of these various acts, the fact remains that it has not yet been done, and since it has not been done the acts do not affect the right in question.

In the case of *Valentine* v. *McGrath,* cited by counsel, the title under the Act of 1884 had become merged in the title afterwards acquired from the government under the Town Site Act. Entry had actually been made and the land patented to the trustee, who, in turn, had conveyed the tracts to the various possessors and occupants under the terms of the Town Site Act. Of course the occupant who had been in possession prior to 1884 stood in no different position under those circumstances from any other occupant, and the trus-

tee conveyed to him the land he occupied. This was all he was entitled to. In this case, the land is still unpatented, and is still held under the possessory title recognized by the Act of 1884.

There has been no specific legislation by Congress providing a method whereby title can be acquired to the lands possessed and occupied at the time of the Act of 1884, and the protection granted by that Act has never been withdrawn. This same matter was considered by this court in *Heckman* v. *Sutter* and *McCloskey* v. *Pacific Coast Co.*

In the case of *Heckman* v. *Sutter,* this Court used the following language:

> "There has been no future legislation by Congress that applies to the present case, for this case involved no question of purchase and entry, and concerns only the right of occupancy and use of certain of the lands of the United States."

In the case of *McCloskey* v. *Pacific Coast Co.,* this court used the following language:

> "There has been no subsequent legislation affecting the right of possession so recognized, and the protection thus afforded by the statute has not yet been withdrawn. The appellee having the right of possession of the tide land between the roadway and the line of low tide could protect his possession by any appropriate suit or action."

The contention of counsel that because an Indian claiming under an Indian Allotment cannot alienate the land so held by him, he shall not be allowed to

alienate the land held by him under the Act of 1884, is without force. The reason an Indian cannot alienate land held by him under the Act of Congress providing for Indian allotments is found in the fact that that Act expressly provides that land so held cannot be alienated. He is granted merely a qualified ownership. No such proviso is contained in the Act of 1884.

A homestead claimant likewise cannot alienate his homestead rights prior to patent for the reason that the homestead laws so provide, and for no other reason.

Counsel contends that the Indian grantors of the appellee might have applied to have those lands set aside for them as Indian allotments, and that if they had so applied and the lands had been so set aside, the lands could not be alienated. The answer to that contention is, that the Indians did not apply to have these lands set aside as Indian allotments, and therefore do not come under the statute pertaining to Indian allotments, but, on the contrary, continued to hold the land as occupants and possessors under the Act of 1884, which places no restriction on the right of the Indians or other persons to alienate their possessory rights, but was a mere recognition of their then existing possessory right, to which was attached the right of alienation regardless of whether the land claimed and possessed was claimed and possessed by an Indian or other person.

Surely it cannot be contended that if an Indian

should purchase a town lot from a white man, or some other tract of real estate, he would not be able thereafter to again alienate the land so purchased, but would be compelled to hold the same in perpetuity.

It is needless, however, to extend the discussion upon this subject any further in view of the fact that the Indian's right to alienate his possessory right was recognized by this Court in the case of *Heckman* v. *Sutter,* and was placed upon the same footing with the white man's right in that regard as it existed under the facts in the case of *McCloskey* v. *Pacific Coast Co.*

Many persons and corporations residing and doing business in Alaska have acquired the rights of early settlers, both Indians and whites. The propriety and correctness of this court's decisions in that regard never having been questioned, it would be a very serious matter if these titles should now be held invalid nor, as we have seen, would there be any reason for such a course. The decisions of this court upon the matter are based upon a correct and accurate understanding of conditions that existed in the Territory at the time the Act was passed, and give to the Act under discussion the effect that Congress intended it should have.

Nor does the case decided by Judge Wickersham and reported in 2nd Alaska, p. 442, and relied upon by counsel, hold anything to the contrary. In that case it was held that the contracts for the purchase of

the lands occupied by the Indians were without consideration and were obtained by fraud. The opinion upon that question reads as follows:

> "The defendants also rely upon the bona fides of their contracts with the Indians, but the evidence shows that the contracts were obtained without consideration and under circumstances which clearly show that the Indians did not understand or appreciate their force and effect."

The opinion then contains the voluntary statement by Judge Wickersham that he cannot bring himself to agree with the ruling in the case of *Sutter* v. *Heckman,* and in that connection he uses the language quoted by counsel in his brief. Surely the statement of Judge Wickersham that he cannot bring himself to agree with the decision in *Sutter* v. *Heckman* can not be regarded as a very serious reflection upon the correctness of that decision.

IV.

In subdivision IV, under the head of "60 Feet Reserved for Road," it is contended by counsel for appellant, that in no case can littoral rights attach to a millsite located in Alaska, for the reason that Section 10 of the Act of 1898 provides as follows:

> "Provided further, that there shall be reserved by the United States a space of eighty rods in width between tracts sold or entered under the provisions of this act on lands abutting on any navigable stream, inlet, gulf, bay, or seashore, and

> that the Secretary of the Interior may grant the use of such reserved lands abutting on the water-front to any citizen or association of citizens, or to any corporation incorporated under the laws of the United States or under the laws of any State or Territory for landings and wharves, with the provision that the public shall have access to and proper use of such wharves and landings at reasonable rates of toll to be prescribed by said Secretary and a roadway sixty feet in width, parallel to the shore line as near as may be practicable, shall be reserved for the use of the public as a highway."

It is not necessary at this time to enter into an extended discussion with reference to the proper construction to be placed upon the language of this statute, for the reason that this court, in the case of *Dalton* v. *Hazelet,* has already held that the last clause in the section relating to a roadway, reserved a roadway only through the reserved lands; that is to say, the eighty foot tracts reserved by the provisions of the Act. Upon that subject, this court after quoting the provisions of the Act, say:

> "The last clause above quoted refers to a roadway through the reserved lands previously described and not through lands granted in fee simple under the homestead laws."

Notwithstanding the severe criticism of counsel, it is only necessary to read the proviso itself in order to become convinced that this court could reach no other conclusion without doing violence to the lan-

guage employed. The proviso deals only with reserved strips, providing in the first instance that such strips shall be reserved, and secondly, how they may be leased and disposed of, and thirdly, for the reservation of a sixty foot roadway. Millsites are not mentioned, nor referred to, and the provision in the proviso for the sixty foot roadway could not be extended to millsites without judicial legislation.

The contention of counsel that, under the decision of court, one reservation is created within and over another, is without force. The proviso provides that any citizen or citizens, or any corporation, may be granted the use of such reserved strips by the Secretary of the Interior. Then follow the conditions under which the Secretary may grant such persons or corporations the use of such strips. One is that the public shall have access to and proper use of such wharves and landings, at reasonable rates of toll to be prescribed by said Secretary; the other is that a roadway sixty feet in width, parallel to the shore line, as near as may be practical, shall be reserved for the use of the public as a highway.

This reservation for a roadway, like the provision that the public shall have proper use of the wharves erected at reasonable rates, does not take effect until the Secretary has granted the use of the strips to a person or corporation under the terms of the proviso. It merely limits the power of the Secretary in leasing these reserved strips. If these reservations were not

contained in the proviso, the Secretary might lease these reservations unconditionally, but under the terms of the proviso the lease must be subject to these two conditions; first, wharves built out from the shore within these reserved areas must be open to the public upon the payment of reasonable tolls; second, a roadway sixty feet in width parallel with the shore line as near as may be practicable, shall be reserved for the use of the public.

In discussing the decision in the case of *Dalton* v. *Hazelet,* counsel seems to take it for granted that the attention of this court was never called to the provision in the Act of 1898 which provides that ingress and egress shall be reserved to the public on the waters of all streams whether navigable or not, nor to the Act of June, 1900, providing:

> "And the reservation of a roadway sixty feet wide under the tenth section of the Act of 1898, 'an act extending the homestead laws and providing for rights of way for railroads in the District of Alaska, and for other purposes,' shall not apply to mineral lands or townsites."

With reference to the first provision, it is but necessary to say that ingress and egress are reserved on the waters of streams only. Ingress and egress are not by this provision reserved to and from the shore of the ocean and its arms. Gastineau Channel is not a stream, but an arm of the Pacific Ocean. Nor does the provision say that ingress and egress shall be

reserved from the shore of the stream to the stream itself, but on the waters of the stream, not to the waters of the stream.

The object of the provision clearly is merely to reserve to miners and prospectors the right to go up the streams in the Territory regardless of whether they are navigable in fact or not. It is a matter of common knowledge that those streams are used frequently as the highways from the shore to the interior, not only when they are navigable in fact, but also when they are in fact not navigable, since they furnish an easy passage through the timbered sections and a uniform grade up the mountain sides.

With reference to the Act of June, 1900, it is only necessary to say that the fact that Congress passed an Act stating that the provisions with reference to roadway should not apply to mineral lands or townsites is not tantamount to saying, as counsel urges, that such roadways shall affect all lands except mineral lands and townsites. It must be borne in mind that mining claims can be located over the eighty rod reserves, and the provision of the act merely has the effect of doing away with the sixty foot roadway in those cases where mineral lands are found within the eighty rod reserves and there located. The Department at one time held that the reserve of eighty rods must also be left between mineral claims, but these decisions of the Department were overruled by the Secretary himself, so that now all are agreed that

the eighty rod reservations have no application to mineral lands. This being the case, mineral lands could be located within the reserves, and in order to free them from the burden of the conditions contained in section ten with reference to the sixty foot roadway, it was necessary that Congress should pass the Act in question.

The same applies to townsites. These can be located within the eighty rod reservations and for obvious reasons should not be burdened with the sixty-foot roadway.

Again: Millsites are located and patented under the mining laws and, while they are non-mineral in character, are dealt with and disposed of under the laws relating to mineral lands.

The Department has held, and very properly so, that millsites are not subject to the provisions for an eighty rod reservation along the shore, being dealt with in that regard as are mining claims. And since every consideration that would lead Congress to exempt mining claims so located from the operation of the provision with reference to the sixty foot roadway would apply with equal force to millsites, there is every reason why millsites should be regarded as mineral lands as the term mineral lands is used by Congress in the Act in question.

However this may be, since these Congressional enactments were passed some ten years prior to the rendition of the decision in the case of *Dalton* v. *Hazelet,*

it is idle to say that their effect was not fully considered by this Court in rendering that decision.

Counsel relies upon and cites two decisions by the Department of the Interior, to wit, the case of the *Alaska Copper Company,* 32 L. D., 128, and the case of the *Alaska Mildred G. M. Co.,* 42 L. D., 255.

In the first of these cases it was held that millsites could not extend to the line of ordinary high tide, but that a strip of sixty feet in width must be reserved between their lower boundary and the line of ordinary high water.

The second decision reversed the first in this regard and held that a millsite might extend to ordinary high water mark, but that the public would have an easement sixty feet in width over the same as nearly parallel with the shore as might be practicable.

The first of these decisions was by the Acting Secretary, and the second by the Assistant Secretary. While the Assistant Secretary in the second decision criticizes the decision of this Court in the case of *Dalton* v. *Hazelet,* he reverses the action of the Acting Secretary in the former decision, and there is no reason why the next Assistant or Acting Secretary to whose attention this matter may be brought should not reverse the action of the Assistant Secretary in the second decision and render a decision in accordance with the case of *Dalton* v. *Hazelet.* The reason why the Assistant Secretary criticizes the case of *Dalton* v. *Hazelet* is that if the roadway were re-

served on the reserved eighty rod strips only it would not be a continuous roadway, but he loses sight of the fact that in any event Congress has enacted that this roadway shall not extend in front of mineral lands and townsites, so that whatever the decision might be the roadway would not be continuous, but would be interrupted by mineral lands and townsites. This reasoning therefore, loses all of its force. Nor would any one at all familiar with the conditions existing in Alaska ever suppose that Congress ever intended to reserve a roadway along the many thousands of miles of water front in that Territory. It would not only prove a serious handicap to mining operations in the Territory, but if rigidly insisted upon would in many cases stop those operations entirely, especially so, if the contention of counsel should be granted, that this roadway cut off all littoral rights. Mining in Alaska is carried on on a very large scale. The ore is exceedingly low grade, so much so that it cannot be mined at all unless the cost of mining and milling is reduced to a minimum.

For reasons that are obvious to any one at all familiar with these operations, the milling plants operated in connection with this class of mining must be built on the seashore and free access must be had to the waters of the ocean in order to furnish cheap transportation and supply these immense plants with a natural dumping ground. Without the enjoyment of all the rights of littoral proprietors these conveniences

could not be had, for however valueless the water front in front of a millsite might be at the time of its location, the construction of a milling plant of the character and size now being operated and constructed in Alaska immediately gives to this water front a new value because of its proximity to such plant. (This is amply illustrated by the case at bar, where the water front in question had no practical value until the operations of the appellee were commenced.) Because of the proximity of the tide lands to these plants, trespassers from every direction would immediately build wharves and otherwise settle upon the water front lying in front of the millsites and make it impossible for the operators of the milling plants either to have access for the purpose of handling their product and their supplies or for the purpose of disposing of their tailings and waste matter. It is a fortunate thing for the Territory of Alaska indeed that the language of the Act of Congress in question is such as it was construed to be by this court in *Dalton* v. *Hazelet,*

It is earnestly contended by counsel that these decisions of the Department of the Interior should control the decisions of this court. It is true that when an Act of the legislature is before the court for the first time for its consideration, the construction placed upon the Act by officers acting under it is entitled to consideration, but when an Act has once been construed by the courts the case is very different. It is then the duty of the officers to follow the construc-

tion placed upon the language by the court, and not the duty of the court to be bound and guided by the construction placed upon the language by such officers.

There is, however, another matter that presents itself in this connection. Even though all that counsel contends for were correct, even though the roadway were reserved for a width of sixty feet in accordance with the provisions of this proviso over millsites located on the shore of the sea,—the conclusions drawn by counsel would not follow. Under the decision of the Department in the case of *Alaska Mildred G. M. Co.,* the roadway is a mere easement and land is patented to the millsite claimant to the water's edge. But counsel will contend that even if the roadway is an easement, the public, as the possessor of the roadway, in the enjoyment of its right of access, has the right to wharf out.

This contention might have some force if the roadway were on the upland bounded by the line of ordinary high tide, but the roadway reserved under this proviso is not necessarily a roadway along the shore bounded by the line of ordinary high tide. It is a roadway sixty feet in width, parallel to the shore, as near as may be practicable. Now a roadway may be parallel to the shore and be a long distance away from it. Again it may not be practicable to place the roadway any where near the shore. It may be necessary, as it is in many places, to go up the mountainside to build the roadway.

The evidence in this case is, that the city of Juneau, in laying out the roadway, made two surveys, one over the tide flats and one over the upland and found that the roadway over the upland was not practicable. There is no evidence that it would be practicable to run the roadway along the shore over the uplands covered by A Millsite. Even though it should be conceded, therefore, that a reservation exists across the A Millsite to the extent that the public have an easement for a roadway sixty feet in width across the same, there is nothing to show that the public will, when it selects its site for a roadway, so construct it that its lowermost boundary will be the line of ordinary high tide. It may not be practicable to so construct it, and it may be constructed further up on the mountain side so that the appellee, as the littoral proprietor will not be disturbed by it, and in such a way that the public as the holder of the roadway will not become the possessor of the upland so as to be a littoral holder.

As applied to the facts in this case, however, a discussion of this subject becomes largely academic. Whatever may be the law with reference to millsites, it could hardly be contended that the appellee as the owner of the claims purchased from the two Indians did not become an upland owner. These claims, or the right of possession to the land embraced within these claims, date back to the 17th of May, 1884, and prior thereto, long before the enactment of the Act

of Congress containing the proviso under discussion No one would contend that these claims did not extend down to the shore, for clearly Congress would not attempt to burden a title previously recognized by it with an easement such as a roadway without granting compensation or at least not without referring to it in express terms.

Furthermore, the Court found, and the uncontradicted testimony shows that the tide lands in front of those uplands, as well as the uplands themselves, were used and occupied by the Indians Bean and Johnson, and that the right of the Indians to these tide lands as well as to the uplands were conveyed to the appellee, thus bringing the case squarely within the facts in the cases of *Heckman* v. *Sutter,* and *McCloskey* v. *Pacific Coast Company.*

V.

Under the title of "The Street," counsel discusses various propositions with reference to the plank roadway built by the city in 1912.

Before taking up this discussion, counsel refers somewhat to the evidence in the case bearing upon this subject. Counsel says the first step in the building of this thoroughfare was taken in July, 1907, when the city passed an ordinance laying out the street and adopting the survey.

This statement of counsel is not entirely accurate. An attempt was made to prove that an ordinance was

passed on the date last mentioned with a view of laying out a street in the vicinity of where the street was since built.

Mr. Pettit, the City Clerk, was on the stand and testified that when he came into office as City Clerk certain ordinances were missing, among others, the ordinance numbered Ordinance 87. That he, however, found in the office of the Governor a newspaper in which this ordinance was purported to have been published, but that he himself did not know whether this was the ordinance or not, or whether it was a copy of the ordinance.

See evidence of Pettit, Rec., p. 181, *et seq.*

E. R. Jaeger testified that he was a member of the City Council in the year 1897, and that an ordinance numbered 87, something similar to the newspaper copy which purported to be a copy of ordinance 87, was passed, but that he did not know of his own knowledge that this was a copy of the ordinance as passed. On page 189, Mr. Jaeger testified in answer to a question as follows:

> "Q. Mr. Jaeger, you don't know whether the document offered in evidence is an exact copy of Ordinance No. 87 or not?
>
> A. I don't know anything about it; I never made a comparison and don't know."

In view of the fact that this was an equity case, the court admitted the newspaper copy of the purported ordinance No. 87 conditionally, saying that he

would further consider the matter, if it became necessary, in deciding the case.

Mr. J. W. Bell, a witness called by the defendant, the appellant here, testified that he was a member of the City Council in the year 1912. That when he came into office there was no ordinance No. 87 on file that he knew of. He understood that there had been such an ordinance but when they came to look it up his impression is that they could not find it. In answer to questions, he testified as follows:

"Q. In laying out the street, you didn't follow any ordinance previously passed?

A. Not that I know of.

Q. And the work was done by you independently of any ordinance?

A. We made two surveys.

Q. Where were those surveys made?

A. They started where the gravel road ends at the present time.

Q. That is this side of the sawmill?

A. This side of the sawmill—this side of the Shattuck oil-house and back of the present street line.

Q. Up on the high land?

A. Up on the high land way above high tide, and the other one ran along the beach.

Q. And those two surveys were considered by the city council?

A. By the street committee—I think the city council accepted them on the report of the street committee.

Q. It was determined that the street along the beach would be the cheaper?

A. That was the idea.

Q. And that is the reason the street along the beach was built and not the street on the upland?

A. Yes.

Q. If the upland street had been the cheaper you would have built the street there and not put the street on the beach?

A. Yes.

Q. And all that surveying was done in the year of 1912 while you were on the council?

A. Yes sir.

Q. Without any reference to any previous ordinance or any previous survey?

A. Yes, sir; we hired a surveyor and had the survey made.

Q. Hired a surveyor, started on the work, laid out the street and built it?

A. Yes sir."

See evidence, Bell, Rec., pp. 191, 192.

A comparison of the two maps also to which counsel refers will show that while the purported street attempted to be surveyed in 1897, was in the neighborhood of the present street, it was not along the line of the present street, and as has already been shown by the testimony of Mr. Bell, which is not contradicted, that survey, if any had been made, had nothing to do with the construction and building of the street in 1912.

In the summer of 1912 the city counsel hired a surveyor, surveyed two different lines, adopted the cheaper one as the most feasible, and built the street, or roadway as it at present exists.

This was done without obtaining permission or consent from the appellee or any one else, and without

having any negotiations with any person whatsoever upon the subject. Upon this question, Mr. Bell testified as follows:

> "Q. In building that street, Mr. Bell, from the sawmill to the end of the city limits, you had no negotiations with the Alaska Juneau Gold Mining Company whatsoever?
> A. None whatever.
> Q. Was any permission had from the Alaska Juneau Gold Mining Company to build the street?
> A. Not to my recollection. *We had no agreement with any one.*
> Q. Never spoke to the company or they never spoke to you about it?
> A. No sir.
> Q. The street was simply built without any talking about it at all?
> A. Yes sir."

See evidence Bell, Rec., p. 192 *et seq.*

These are the facts with reference to the construction of the street or roadway. It was built in the summer of 1912, and not only was no consent or permission obtained from the appellee, but no agreement was had with the Indian grantors of the appellee, for Mr. Bell testified as above quoted, *"We had no agreement with anyone."*

Under Subdivision A, counsel then proceeds to argue that the highway can not be vacated on collateral attack.

In reply to counsel's argument in this regard, it is only necessary to say that this is a suit against the Worthen Lumber Company and not against the city,

and was not brought for the purpose of vacating the street. The court is not asked in this suit to vacate the street. Hence further discussion on this subject is not necessary.

Under Subdivision B, it is urged that the street was located prior to the millsite, and for that reason it was rightfully constructed because of the provisions of Section 2477, providing that the right of way for the construction of highways over public lands not reserved for public use is hereby granted.

In view of the fact that the plaintiff is now the owner of the tracts held by the two Indians, Bean and Johnson, ever since the year 1881, and that this street extends not only in front of the upland covered by these two tracts, but lies over the tide flats which were also claimed and occupied by the Indians, it becomes quite immaterial as to when the street was located with reference to the millsite. However, the statute authorizing the location of highways over the public lands did not authorize the location of highways over the tide flats which are held in trust by the general government for the use of the future state, any more than the mining law which authorizes the location of mining claims upon the public lands authorizes the location of mining claims on the tide flats.

In the case of *Lewis* v. *Johnson,* reported in 1st Alaska, 529, one of the parties had gone upon the tide flats while the land was still public land, and suit was

afterwards brought to enjoin this possession. The court held that he was a mere trespasser, and that when the plaintiff acquired his title he acquired the whole title together with the right of access to deep water and could eject the defendant notwithstanding his prior possession.

Should it be granted, therefore, that counsel's contention was correct, that the millsites did not become valid locations until after the construction of the street, the millsite claimant would acquire the whole right of possession, including the right of access whenever the right to the millsite attached. But the facts are, that the A Millsite was located in 1911, and this millsite, as a reference to the small plat which is made a part of the court's findings will show, covered all but a few feet of the upland above the tide land in dispute, and the U Millsite was located to cover this small fraction two years later. Also as has already been shown from the record, appellee commenced work looking towards the construction of its milling plant in the summer of 1911, one year before the street was built, and continued such construction work at all times since, so that when the street was constructed appellee had not only located the A Millsite, but was actively carrying on construction work upon it as well as the other millsites which form part of the group. The contention of counsel that these millsites were not actually occupied and used ever since 1911, is not borne out by the record. The wit-

ness Lindsay testified (page 174 of the record) that in the summer of 1911 there was work done on some of the millsites.

The witness Wayland testified (at page 177 of the record) that the Alaska Juneau Company commenced work on the group of millsites looking towards the construction of the milling plant on it, in the summer of 1911, and that that work then commenced had been carried on continuously ever since during the working season. That men had been at work there at all times from 1911 up to the present time, excepting in the winter time, when work could not be carried on.

The testimony of other witnesses shows that a sum in excess of a million dollars has already been spent in that behalf. The map in evidence shows structures of some kind or description placed on all the various millsites; also the structures that will be there when the milling plant has been completed.

It is idle, therefore, to contend that all that could be done looking toward the construction of a milling plant on the millsite under discussion was not done. A milling plant of that size and character can not be constructed in a day, nor does the law require anything of that character. Moreover, as has already been stated, the question of the validity or invalidity of the millsites, or when they were located, is a matter that does not affect the issues in this case, since the ground here in dispute, both the upland and the

tide land, was occupied by the Indian grantors of the appellee since 1881, and no patent having been obtained to the millsites these Indian titles are still subsisting titles held by the appellee.

Under Subdivision C counsel attempts to show that when the Indian titles were purchased, they were burdened with the easement of the street, and that the appellee took subject to this easement.

The evidence of Mr. Bell, as we have already shown, shows that the city did not make any agreements with any one: that the city went there not only in disregard of the rights of the appellee, but in disregard of the rights of the Indians as well, and constructed the street.

Now it is difficult to see in any case how the city could, by trespassing upon the lands of another, whether it be the appellee or the Indians, not only acquire a valid right to the ground trespassed upon, but acquire a right so sweeping as not only to deprive the appellee or the Indians of the land actually taken, but also of the most valuable right that attaches to the lands that were left; that is to say, the right of access to deep water from those lands.

It is clear from a consideration of the case of *McClosky* v. *Pacific Coast Company,* that this court did not take that view of the situation. In that case this court discussed with great care and particularly the rights of the public in maintaining the street and the evidence bearing upon that subject, indicating that the

court deemed it of the highest importance to inquire first of all whether the street was there rightfully.

But there are special circumstances which enter into this case. The court found, and, as we have already demonstrated, this finding was supported by the uncontradicted testimony upon the subject, that the street was not only built upon the tide flats below the line of ordinary high tide, but was so built that it did not cut off the access of the upland owner.

Now under the authority of *Decker* v. *Pacific Coast Company* and *Columbia Canning Co.* v. *Hampton,* as well as the more recent case of *Barron* v. *Alexander,* the upland owner, whether the upland belonged to the Indians or to the appellee, could not stop or prevent the construction of the street for the reason that it did not interfere with the access to deep water. If a suit had been brought to prevent this work of construction, it would have been at once dismissed by the court on that ground. So long as the city did not cut off this access, it had a perfect right to construct the street. The appellee, as well as the Indians, were helpless to prevent its construction, for the simple reason that they were not injured thereby. Their rights were not invaded. Their access to deep water was as unobstructed after the street was constructed as before; yet it is argued that because of the construction of the street under those circumstances their right of access, the most valuable right attaching to their upland, was lost. Clearly this would be taking property not only

without compensation, but without very much ceremony, and would hardly be sanctioned under the authority of *Yates* v. *Milwaukee,* 10 Wallace, 504, previously discussed.

The foregoing, we think, sufficiently answers the various propositions of laches, estoppel, and other like matters urged by counsel in subdivisions D and E. Clearly one cannot be guilty of laches and cannot be estopped because he permits anything to be done the doing of which he is powerless under the law to prevent.

VI.

Under Subdivision VI, counsel enters into a discussion relating to appellee's right to wharf out over the shoal waters lying between its upland and the deep waters of Gastineau Channel.

At the outset, it must be stated that appellee intends merely to build a wharf in order to facilitate its access to deep water, and that the wharf is only to be used in connection with the exercise of this right of access. This is clearly shown by the uncontradicted testimony and the findings of the court. It therefore becomes unnecessary to discuss the upland owner's right to build a wharf for other purposes and other uses. In the case of *McCloskey* v. *Pacific Coast Company,* this court said that the upland owner, while he had no right to build the wharf because of his upland ownership, had the right of access. It was not neces-

sary for this court in that case to explain this matter any further, but in the case of *Hazelet* v. *Dalton* the court held that the upland owner had a right in order to reach deep water from his upland, that is to say in order to exercise his right of access, to build and use a wharf for that purpose. These two decisions by this court are therefore in perfect harmony. The upland owner, as is held in the former case, has no right because of his upland ownership to build a wharf, but he has a right of access because of his upland ownership, and if, in connection with the exercise of that right it is necessary to use a wharf he has a right to use and maintain it, for, as was said by this court in the latter case, this right of access would be useless unless in its exercise the upland owner had a right to build a structure over the shoal waters which would enable him to reach deep water from his upland. This whole matter was gone over and decided by this court in the case of *Dalton* v. *Hazelet.* In that case the appellee owned a tract of land bordering on Orca Inlet, patented under the homestead laws. The defendant had driven piles in front of a portion of the tract owned by the plaintiff, and had capped and covered these piles. Suit was brought to enjoin the maintenance of this structure. The defense was that the defendant had gone upon the unoccupied tide lands, driven the piles and constructed the structure complained of for use as a wharf,—that the Copper River Railroad had condemned a strip

of land along the shore for railroad purposes, and that because of this the plaintiff's riparian rights, whatever they were, had been lost; and further, that no such riparian rights existed by reason of the reservation for a roadway provided for in the Act extending the homestead laws to Alaska.

The lower court granted the injunction; on appeal it was held by this court that the findings of the lower court was such as to leave the inference that the right of way for the Copper River Railway extended along the shore in such a manner as to leave the plaintiff some land between it and the waters of the Inlet. It was held, however, that independent of this fact, the existence of the railroad's right of way would not cut off the riparian or littoral rights of the upland owner. The court then proceeded to hold that the sixty rod roadway was not reserved across the tract patented under the homestead laws, but that this reserve for a roadway applied only to the lands reserved from entry under the provisions of the Act.

The court then held that the upland owner had a right of free access to the deep waters lying in front of his upland and had a right to wharf out across the shoal waters of the shore in order to reach deep water. Upon this point the court say:

> "We think that under the facts stated, the plaintiff is entitled to have relief against this obstruction. That while in a territory a grant of land

bordering on or bounded by navigable waters conveys to the grantee no right or title to the shore or soil below high water mark, nevertheless, such a grantee has the right to a free and unobstructed access to such waters. But how shall the littoral owner have access to navigable waters when shoal water intervenes? The Supreme Court has answered this question in *Dutton* v. *Strong,* where the Court say:

"'Wherever the water of the shore, so to speak, is too shoal to be navigable, there is the same necessity for such erections as in the bays and arms of the sea: and where that necessity exists it is difficult to see any reason for denying to the adjacent owner the right to supply it; but the right must be understood as terminating at the point of navigability where the necessity for such erections ordinarily ceases.'"

In view of this decision by this court, it would seem useless to further discuss this point.

The contention of counsel that the case of *Yates* v. *Milwaukee,* and *Dutton* v. *Strong* were subsequently overruled by the Supreme Court in the case of *Scranton* v. *Wheeler* is without foundation. The opinion in the case of *Scranton* v. *Wheeler* admits of no such construction.

The same contention was made in a recent case before the Supreme Court of California, and that court, after carefully reviewing the matter, took the view taken by this court in the case of *Dalton* v. *Hazelet,* and held that the case of *Scranton* v. *Wheeler* in no wise changed the law as laid down in *Yates* v. *Milwaukee* and *Dutton* v. *Strong.*

Touching this matter, the Supreme Court of California say:

> "That case involved the right of the sovereign to use and improve its navigable waters, and in the opinion it was said:
>
> " 'The decision of *Yates* v. *Milwaukee* cannot be regarded as an adjudication upon the particular point involved in the present case' instead of being overruled the case of *Yates* v. *Milwaukee* was not even criticized. It has been usually followed in the several states and by the Federal courts."

Then follows a long list of citations from both State and Federal courts.

> *San Francisco Savings Union* v. *G. R. Petroleum Mining Company,* 144 Cal., 134.

No further discussion of the case of *Scranton* v. *Wheeler* is deemed necessary, as the opinion in that case clearly speaks for itself.

The next point sought to be made in this connection is that because it was not shown in evidence that the appellee had applied for and received a permit from the Secretary of War to construct a wharf, this action can not be maintained.

Whether such permit was obtained, however, at the time of the trial is wholly immaterial. The right of access to deep water and the incidental right to construct a wharf in connection with the exercise of that right of access, is not derived from any permit issued by the Secretary of War, but is a right that the upland

owner has by reason of the ownership of the upland, and of this right the owner of the upland can not be deprived without due process of law and without the payment of compensation.

Yates v. *Milwaukee,* 10 Wallace, 504.

The Act of Congress referred to by counsel did not grant the owner of upland the right of access. He had this right before the passage of the Act, nor can the Act be so construed as to deprive him of this right without compensation under the authority of *Yates* v. *Milwaukee.* The Act referred to can be upheld only as a measure intended to regulate the construction and maintenance of wharves and other like structures, passed by Congress under the police power, and since the appellee was not at the time of the trial either constructing or maintaining a wharf, the Act in no wise affects the issues in the case. The appellee's right of access belongs to it as the owner of the upland, and this right having been obstructed by the appellant, it had a right to relief. When the appellee actually commences the construction of a wharf, or maintains a wharf on the premises in question, the question of whether or not it has obtained the necessary permits can, of course, arise as between it and the government, but no such question could arise at the time of the trial, there having been no construction or maintenance of any wharf in violation of the Act, unless the attempted construction of a platform by the ap-

pellant for the purpose of storing its lumber be such a violation. In any event the appellee had not violated the Act in any regard.

The effect of the Act of Congress under consideration was discussed by the Supreme Court of California in the case of *San Francisco Savings Union* v. *G. R. Petroleum Mining Company,* 144 Cal., 134, where the court say:

> "The Secretary of War cannot grant rights to lands owned by the state, nor can he deprive plaintiff of his property and rights by authorizing a stranger to take them."

VII.

Counsel here contends that because of prior possession, appellant is entitled to protection.

The evidence clearly shows, as has already been pointed out, and this much is conceded by counsel in his brief, at page 72, that the sawmill was originally built on the thousand-foot Jorgenson reservation and that the log boom did not extend out to the south of this reservation until the summer of 1912, when five dolphins were driven to the south of the southernmost line of the reservation. That is to say, ten piles were driven in pairs so as to make five dolphins placed fifty feet apart, and something like 17 piles were also driven at the same time approximately along the line now occupied by the street. This is the first and only evidence of possession of any tide lands to the south

of the Jorgenson reservation on the part of the appellant that is contained in the record, and when these piles were driven appellee had purchased the General Grant Mining Claim from Mr. Shattuck, the President of the Alaska Supply Company, by which the piles were driven, and had located its millsites, and the Indians, who the following year conveyed their title to appellee, were in possession not only of the upland, but of the tide land as well.

The prior possession that is protected by the courts is the possession and occupation of public lands by the first-comer, who applies the same to some useful purpose. It is not the possession and occupation of a mere trespasser, who goes upon the lands already possessed by another, or, what amounts to the same thing, goes on the tide flats in front of the lands of such other, with the view to cutting off such other's access to deep water. The driving of the piles by appellant in 1912 was an invasion of the rights of the upland owner if the maintenance of such piles interfered with his right of access, and was a naked trespass as against the Indian occupants of the tide lands, who had the right of possession and occupancy of such tide lands under the Act of May 17, 1884.

In this connection, also, it may be added that the driving of these piles did not constitute the taking of possession of the tide land in question.

The statement by counsel that the construction of a wharf over the tide land in dispute will seriously

inconvenience appellant is without foundation, and is not borne out by the testimony. That the Jorgenson reservation furnishes appellant all of the room necessary in the conduct of its business is evident from the following facts: J. P. Jorgenson, the builder of the mill, originally limited himself to the use of this thousand feet, conveying his interest to the balance of the area covered by the Abe Lincoln and General Grant to appellee's grantors, evidently believing that the thousand-foot strip was sufficient for his purposes. From the year 1902 until the year 1912, a period of ten years, the sawmill was actually operated continuously without extending the log boom beyond the thousand-foot reservation, and in the year 1911, while Mr. Henry Shattuck was President of the Alaska Supply Company, the concern by which the mill was being operated, he, instead of reserving for the use of his company an area in addition to the thousand-foot strip, conveyed the General Grant claim to appellee. Clearly, if the water front lying in front of this claim was at all necessary in connection with the operation of the sawmill, Mr. Shattuck would, instead of conveying the General Grant claim to appellee, have reserved it for his own use.

Appellant's contention that the construction of a wharf over the shoal water lying between the upland and deep water would be an obstruction to navigation finds no support in the authorities. The upland owner in connection with the exercise of his right

of access has a right to construct a wharf from his upland to deep water which is regarded as the point of navigability; beyond this he has no right to go, but he has the unquestioned right of building a wharf over the shoal waters until the point of navigability, a point where the water is deep enough to admit of the passage of ships, is reached. Upon this point all the authorities are a unit.

Dalton v. *Hazelet,* 182 Fed., 561;
Dutton v. *Strong,* 1 Black, 339;
Yates v. *Milwaukee,* 10 Wallace, 504;
Ill. Cent. R. R. Co. v. *Illinois,* 146 U. S., 387;
Lewis v. *Johnson,* 76 Fed., 477;
Reeves v. *Backus-Brooks Co.,* 86 N. W., 337;
Gray v. *Bartlett,* 32 Am. Dec., 208.
Hallock v. *Suitor,* 60 Pac., 384;
Thayer v. *New Bedford R. R. Co.,* 125 Mass., 253;
Burrows v. *Gallup,* 87 Am. Dec., 187;
Powell v. *Springston Lumber Co.,* 88 Pac., 97.

VIII.

STATEMENT OF APPELLEE'S POSITION.

In replying to the various contentions of counsel for appellant, we have in a large measure, although it was done in a disconnected manner, stated our own position.

The purchase of the Abe Lincoln and General

Grant Lode claims by appellee from the grantee of the J. P. Jorgenson Company, Mr. Henry Shattuck, who was at the time of the grant himself acting as President of the Alaska Supply Co., the name by which the J. P. Jorgenson Company was then known, notwithstanding the fact that the claims had just previously been declared to be non-mineral in character, not only shows that the appellee dealt with the highest degree of fairness in obtaining title to the ground in question, but places the appellant in the unenviable position of now seeking to claim rights because of the driving of some piles by Mr. Shattuck on the beach in front of ground the title to which Shattuck, the grantee of the Jorgenson Co., and also that company's president, had transferred to appellee.

The location of the millsites to cover the same area was, of course, made necessary by the decision of Department and in view of the fact that the premises were to be used as a site for a milling plant, this was clearly the appropriate manner in which to acquire the title. The purchase of the Indian claims for a fair and adequate consideration again gives evidence of appellee's disposition to deal fairly with all those having legitimate claims to the area required by it as a site for a milling plant. Surely the appellee did all that could be done to acquire the rights which the necessities of the case, as disclosed by the evidence, now compel it to insist upon, and the appellant, be-

cause of the matters referred to, should be the first to concede those rights.

Appellee's rights to the upland can not be, and are not, questioned. That appellee has a right, as an upland owner, to access from its upland to the deep waters of the Channel lying in front of it, and that it has the right to wharf out in the exercise of that right can not be seriously disputed as a legal proposition. The contention that the upland owner's right of access is cut off and lost because a municipality, without a grant from the upland owner and without his consent, constructs a roadway over the tide flats in such a manner as not to cut off the upland owner's access, thereby rendering him powerless to enjoin or interfere with the construction of the roadway, asserts a proposition that refutes itself.

But aside from these considerations, a further reason exists why the decree of the lower court is correct and should be affirmed.

The complaint alleges and the court finds not only that the Indian grantors of the appellee occupied and possessed the two tracts of upland which embrace all the upland lying above the tide land in dispute, but also that those Indian grantors occupied and used the tide land; that is to say, the land lying between ordinary high water and low water, on and prior to the passage of the Act of May 17, 1884.

The finding of the court upon this subject is as follows (Finding No. 4):

> "That on and prior to May 17, 1884, and from that date continuously, the upland immediately abutting upon the tide-land in dispute herein was also claimed and occupied by Indians, who claimed, occupied and used the same, together with the tide-land in front thereof, as a place of residence and as a place for landing and hauling up of canoes and for other purposes; and that at the time of the doing of the things complained of in this suit plaintiff had acquired by purchase all of the said right, title, interest and claim of the said Indians in and to said upland and said tide-land, and is now the owner of said rights."

Appellant's brief, at page 10, contains the following language:

> "Appellant most earnestly contends that there is no evidence in the records sufficient to support the Court's findings that the Indians had a good title to the premises in question, nevertheless, inasmuch as appellee alleged and the learned court below found as a fact that the upland was occupied and owned by certain Indians under the law of 1884 until they sold to appellee in 1913, after Franklin Street was constructed, appellant is disposed to accept the consequences of that finding and to treat it as binding on this appeal. Appellee, having led the Court to make this finding, is estopped from attacking it."

Four witnesses testified to the effect that each of appellee's Indian grantors settled on the tract claimed by him "one year after the camp was struck," that is

to say, the year 1881, and claimed and occupied the same until he conveyed to the appellee. These witnesses agree that these Indians not only during that time occupied the upland, but occupied and used the tide land as well. That in both cases the rocks and debris had been cleared off from the tide land and the same used and occupied in connection with the hauling in and landing of canoes, and that in the case of Johnson, a canoe shed also had been built on the tide flat for use in this connection. (See evidence Fannie Johnson, Rec., pp. 134, 135; evidence Jimmie Johnson, Rec., pp. 130, 131, 132; evidence St. Clair Johnson, Rec., pp. 112, *et seq.*; evidence Tom Johnson, Rec., pp. 124, *et seq.*)

No evidence whatsoever was offered by the appellant to contradict or deny the testimony of any of these witnesses, so that the finding of the court in regard to this matter is based upon the undisputed evidence.

Such being the case the appellee has, under the authority of this court, in the cases of *Heckman* v. *Sutter, McCloskey* v. *Pacific Coast Company,* and *Hampton* v. *Columbia Canning Co.,* the right not only to wharf out over its tide flats, but the right to the possession and occupancy of the tide lands themselves. And regardless of the manner in which the roadway or street was constructed, and regardless of the question of what the effect of the construction and maintenance of a roadway or street in other cases would be upon the rights of the upland owner, ap-

pellee in this case would have the right to the occupancy and use of the tide flats in dispute, and upon which appellant was at the time of the commencement of this suit attempting to construct a platform.

This precise question was passed upon by this court in the case of *Heckman* v. *Sutter* and *McCloskey* v. *Pacific Coast Company*. In the case of *Heckman* v. *Sutter,* an Indian had occupied and used a piece of upland in connection with the construction and maintenance of a house, and had used the tide flats in front of the land so occupied at certain seasons of the year for the purpose of drawing his nets over these tide flats in carrying on his fishing operations. This court held that this was sufficient under the Act of 1884 to entitle the grantee of this Indian to the occupancy and use of these tide lands. In passing upon the effect of the Act of 1884, this court say:

> "The prohibition contained in the Act of 1884 against the disturbance of the use or possession by any Indian or other persons of any land in Alaska claimed by them is sufficiently general and comprehensive to include tide lands as well as lands above high water mark."

Again, in the same opinion, the Court say:

> "Congress saw proper to protect by its Act of 1884 the possession and use by these Indians and other persons of any and all lands in Alaska against intrusion by third persons, and so far has never deemed it wise to otherwise provide. That legislation was sufficient authority, in our opinion, for the decree of the court below securing the com-

plainants in the use and possession of land which the evidence shows and the court found was held and maintained at the time of their disturbance therein by the defendants."

Heckman v. *Sutter,* 119 Fed., 88-89.

In the case of *McCloskey* v. *Pacific Coast Company,* one Murray had laid claim to a tract of upland together with the tide land lying in front thereof by making a location thereon prior to the Act of 1884. A street had been built in such a manner that it was partly upon the upland and so as to separate the upland from the tide land and make the public as the holder of the street the littoral occupant and holder. The court held that under those circumstances, it having first decided that the street had been properly dedicated and subsequently by solemn conveyance conveyed to the city, the street cut off the littoral rights of the Pacific Coast Company, it having been found that the company ceased because of the existence of the street to be a littoral proprietor, but that notwithstanding this the Pacific Coast Company as the grantee of Murray who had located and claimed the tide flats prior to the passage of the Act of 1884, was entitled to the possession of the tide lands and could maintain a suit to enjoin the interference with its possession. In passing upon this matter, the court say:

"We find such ground in the fact which is shown by the bill and in the proofs that the appellee's grantors at the date when the Act of Congress of May 17, 1884, was enacted, claimed the possession

and the right of possession to all the tide lands in front of their property, and have ever since maintained such claim except so far as they have conceded the public use of the street and sidewalk. That Act of Congress provided a civil government for Alaska, and, among other things, enacted 'that the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which said persons may acquire title to said land is reserved for future legislation by Congress.' There has been no subsequent legislation affecting the right of possession thus recognized, and the protection thus afforded by the statute has not as yet been withdrawn. The appellee having this right of possession of the tide land between the roadway and the line of low tide could protect such possession by any appropriate suit or action."

McCloskey v. *Pacific Coast Co.,* 160 Fed., 801.

The doctrine laid down in these cases was reaffirmed by this Court in the more recent case of *Columbia Canning Company* v. *Hampton,* 161 Fed., 60.

Under the facts and findings of the court and the authority of the cases just referred to, appellee's right to the relief demanded is clearly established, and the decree of the lower court should accordingly be affirmed.

Respectfully submitted.

HELLENTHAL & HELLENTHAL,
Attorneys for Appellee.

CURTIS H. LINDLEY,
Of Counsel.

No. 2640

United States
Circuit Court of Appeals
For the Ninth Circuit

WORTHERN LUMBER MILLS,

Appellant

vs

ALASKA JUNEAU GOLD MINING COMPANY,

Appellee

Appelee's Petition for Re-Hearing

Comes now appellant above named and respectfully petitions this honorable court that a re-hearing be ordered in the above entitled cause upon the grounds and for the reasons below set out and to which the court's attention is most earnestly invited:

The one cardinal question submitted to the court in this case was whether or not appellee had an *ex-*

clusive right to access from the street to the adjoining navigable waters, or whether appellee shared that right with the public. If appellee shared the right of access with the public it concededly had no standing in court in this proceeding.

This court decided this question against appellant's contention under what appears to be a radical misapprehension of our position, and holds, not in express language, but by necessary inference, that appellee has the exclusive right of access to navigable water from the street and that the public have no such right of access.

Our cardinal contention is that the public have a right of access to navigable water wherever such access can be gained without trespass on private property, and that therefore the public have a right of access from Franklin Street to the adjoining waters. Obstruction to such access being a public and not a private wrong, it can be enjoined only at the instance of the public.

This court, in conformity with the holdings of the lower court, finds that Franklin Street is one of the principal streets of Juneau. We shall construe this, for the time being, to mean that this court finds Franklin Street to be a public thoroughfare, with the right in the public to use it as such. The court does not deny that the public waters adjoining the street are also a public thoroughfare. Nevertheless, this court holds that though the public have a lawful right to be both on the street and on the navigable

highway adjoining the street, they have no right to pass from one to the other, and that this right of ingress and egress from the public street to the public highway alongside of the street belongs *exclusively* to the Alaska Juneau Gold Mining Company.

The leading error of the court, as we see it, is found in the following statement in the opinion: "Franklin Street interposes, in fact, no obstacle to the appellee's access to the waters of Gastineau channel, and we hold that it interposes no obstacle in law." Appellant has never contended that Franklin Street interposed a practical obstacle to appellee's access to Gastineau Channel. It may be admitted that it facilitates such access. Nor has appellant ever contended that the street interposed an obstacle in law to appellee's access to Gastineau Channel. On this point the court has absolutely misunderstood our position. What appellant contended and contends is that the appellee has no *exclusive* right to such access from the street, but shares such right with the public, and that without such exclusive right of access, it cannot maintain this action unless this court means to depart from the old and well established landmarks of jurisprudence.

29 *Cyc.* 1208;
29 *Cyc.* 324;
Gould on Waters, Par 122.

Our position is that where a private party owns or has a right of exclusive possession of upland adjoining a highway,—whether this be a navigable

highway or not,—such party has an exclusive right to go from that highway to his private premises adjoining it. Anybody else attempting to do so would be a trespasser. Any obstruction of that right of access to the public highway from those private premises would therefore be an obstruction of a private right, and as such would be actionable at the instance of the private injured party. But where the public have a right to be on the premises adjoining the highway,—whether it be a navigable highway or not,—they have a right to pass to such premises from such highway as long as there is no intervening zone of private property rights upon which trespass will thereby be committed.

Where thus the right of access to and from a public thoroughfare is a public right, any obstruction of it is a public and not a private wrong, and can be redressed only at the instance of the public acting through the proper officials.

See authorities above cited.

It is admitted that where the upland is owned by a private individual and a highway be established over the upland adjoining the water, the upland owner has still an exclusive right of access from his land to the highway, *but from this highway to the adjoining water he must share this right with the public.* This is what the courts mean when they say that a public highway adjoining navigable water cuts off the littoral right,—for littoral right is private right as distinguished from right shared with the public.

Counsel for appellee recognized this position as incontrovertible and sought to evade it by claiming that there was some mystic, sacred right attached to the line of mean high tide which gave whomsoever had possession of this line the exclusive right to cross any property below that line. But in the reply brief this contention was shown to have for support neither reason nor authority and this court has not dignified the alleged doctrine by even a reference to it.

It was contended in appellant's brief that navigable waters were a public highway clear up to line of mean high tide. This has not been controverted by appellee, nor is there anything in the court's opinion which indicates a disapproval of this doctrine. It is not necessary to look beyond the authorities cited on page 64 of appellant's brief for support of this contention, and we shall therefore not burden the court with any further discussion of that subject, but we shall assume that the court assents to the proposition. This assent is an affirmation of the proposition that the public have a right to be on and make use of all the navigable waters below line of mean high tide, but this again involves the assent to the proposition that *the public have a right of access to the navigable waters, whenever such access can be had without trespassing on private premises.*

Can, under the facts of this case, the public have access to the waters of Gastineau Channel from

Franklin Street without trespassing upon any private property?

Gastineau Channel adjoins Franklin Street. There is no space between the two. One merges into the other. The public may therefore pass from the street to the navigable highway, and from the latter to the public street, without touching or in any way interfering with private property.

There are, however, certain remarks made by the court which indicate that the latter is of the opinion that though this street be a public thoroughfare, yet it is possessed of certain properties different from those which pertain to the ordinary street open to public travel. The court says:

> "The facts go no farther than to show that a municipal corporation has laid out the street on tide lands in front of the upland and has used it for two or three years without having secured from the upland proprietor any right so to do, or obtained that right by condemnation proceedings."

If the street be a public highway, as the court seems to affirm at another place in the opinion and nowhere denies, surely the right of the appellee's access from the street to the adjoining navigable highway has merged in the public right of such access, for the Alaska Juneau has no greater right on either highway, wet or dry, than have the public.

If, on the other hand, the court wishes to be understood as holding that Franklin Street is not a

public thoroughfare and that the public have no right to travel it, then we implore of the court to read the argument on this subject contained in chapter V, (page 40) of our original brief. That argument was left untouched by counsel. In fact, counsel admitted that the street was a public thoroughfare, and sought to evade the effect of this forced admission by contending that by virtue of its possession of the line of mean high tide appellee had the exclusive right of access from the street to the adjoining highway on water.

It must be assumed from the above language by this court that the court intends to hold that if Franklin Street had been dedicated to public use by the owner of the premises over or in front of which it runs, or had been condemned for public use by the city, or had been used for a long period of time as a street, the appellee would have no exclusive right of access from the street to the water, and that this would be so whether the street is constructed over tide-land or over high-land, so long as it adjoins navigable water on at least one side.

It now becomes pertinent to inquire how long must the street be used as such before appellee's *exclusive* right of access to it from the adjoining waters ceases and it be forced to share the right of access with the public? Will it be in five years or in ten years?

If we correctly surmise the court's meaning, the answer must be: "Whenever by user the street has

become so well established that the appellee cannot question the right of the public to use it." But the law is settled beyond controversy that appellee is not now in position to question the legality of this street. This was, at least by implication and tacitly, admitted by counsel in their brief and by their failure to answer any part of the argument submitted in chapter V of our original brief.

Inasmuch as this court has ignored the authorities there cited and quoted from, though these authorities meet the issues squarely, we again earnestly beg of the court to consider them. Two of the points discussed in that chapter we beg to especially emphasize here:

This court has held that at the time the street was built the upland was owned and in the possession of the Indians. The largest Indian tract, lot "B," known as the Jimmie Bean tract (page 148), was owned by and in the possession of this Indian even at the time this action was instituted and for at least twenty days thereafter. The complaint was served August 5, 1913. The deed to the Jimmie Bean tract was not executed till August 22, 1913, and was not acknowledged till three days later (page 231). The other Indian deed was also executed after the street was built, but before this action was commenced, to-wit, May 1, 1913 (page 237). When the Alaska Juneau purchased these premises from the Indians, it took the lands subject to the burdens *rightfully* or *wrongfully* imposed upon them during the

ownership of the grantor. On this subject the Supreme Court says:

> "It is well settled that where a railroad company having the power of eminent domain has entered into possession of land necessary for its corporate purposes, *whether with or without the consent of the owner of such lands*, a subsequent vendee of the latter takes the land subject to the burdens of the railroad."
>
> *Roberts vs. N. P. Ry.*, 158 *U. S.* 1.

This language has been repeated verbatim and applied in the following cases:

> *Maffet vs. Quine*, 93 *Fed.*, 347 (349)
> *Northern Pac. Ry. vs. Murray*, 87, *Fed.*, 648 (651);
> *King, et al, vs. Southern Railway Co.*, 119 *Fed.*, 1017;
> *Kakeldy vs Railway*, 80 *Pac.*, 205.

The doctrine is universal and applies to all corporations having the right of eminent domain.

Judge Bellinger, paraphrasing the language of the Supreme Court, announced the doctrine in its universal application through the following language:

> "It is settled that where a company having the power of eminent domain has entered into possession of land necessary for its corporate purposes, *whether with or without the consent of the owner of such land*, a subsequent ven-

dee of the latter takes the land subject to the burden thus placed upon it."

This court does not deny that such is the law. Nor does the court say that this law does not apply. Why then should appellant be denied the benefit of this law?

Not only is the appellant entitled to know, but the entire bar and the public are entitled to know why these litigants should not be governed by this universal principle which has stood the test of ages and received the confirmation of the highest judicial authority in the country.

But even if the appellee had been the owner of the premises at the time the street was built, it is not now in position to dispute the right of the public to use the street.

As a corollary to the doctrine above discussed, there is another and equally conclusive doctrine applicable to this point of the case. It is this: Where a street has been established *with or without the permission of the land owner*, it is to all intents and purposes a public thoroughfare; and if the land owner has a complaint, his remedy is an action for damages,—he cannot dis-establish the street or interfere with the public traffic. This doctrine is put in the following language by the Circuit Court of Appeals for the Seventh Circuit, in the recent cases of Kamper vs. Chicago, 215 Fed., 706:

"When a public or quasi public corporation,

having the delegated power of eminent domain, without condemnation proceedings, enters upon land (which the owner would be powerless to hold against appropriation for public use) and thereupon completes a public work and is using it in public service, the land owner will not be permitted, by ejectment or mandatory injunction, to retake possession and thus break in two a railroad or a water tunnel or other work which is being used as an entirety for the public good. This is so, not because equity refuses to frown upon unlawful seizure, but because equity will not tolerate a possessory demand being turned into a means of oppression and extortion, and because a consideration of the rights and convenience of the public outweighs the qualified possessory right of the owner,—a right he could not have absolutely maintained even initially as against the public use. And equity sufficiently indicates its disapproval of the wrongful taking by pointing the owner to the law courts, where his right to compensation can be determined."

The authorities supporting this doctrine are discussed in section E (page 57) of the original brief. We have found no conflict in the authorities on the subject, nor have counsel denied either the correctness or the applicability of the doctrine as above announced, nor has this court denied either the correctness or the applicability of our contention on this sub-

ject. Why then is appellant deprived of the benefit of this law?

When Mr. Worthen, as appears by the records, came to Juneau in the early part of 1913 and found the street fully establishsed and used as a public highway, he had a right to rely upon this incontrovertible legal doctrine to protect his investments in the mill property against all but his government. His counsel had a right to advise him that under these universal decisions of the highest tribunals, the street was to all intents and purposes a public highway and would protect his lumber-yard and booming-grounds against any private aggression, and Mr. Worthen had a right to invest his money in reliance on such advice.

If it is the intention of the court to overrule the authorities on this point, it should be done so clearly and explicitly that the bar may not be in doubt as to what is meant.

Surely, in face of all these authorities, the street here in question, even were it in the first place illegally established, even over the protests of the land owner,—which is not the case,—it would be in every respect, as far as the public is concerned, a public thoroughfare possessed of all the legal characteristics of a public highway. Public traffic thereon cannot be interefered with by private individuals. The street cannot be closed by the courts. And the public have just as much right of access from it to the waters of Gastineau Channel as has appellee.

The decision of the court in this case, if allowed to stand, will unsettle a vast amount of property rights in Southeastern Alaska. The country is so rugged that in most settlements the principal streets are constructed over tide waters. At many places the larger part of both the business and residence district is erected on piles. Ketchikan has approximately two miles of tide-land street thus constructed. Juneau has over one mile of street built below tide line. Business houses and residences are erected on both sides of these highways. Such streets are built sometimes by private individuals impatient at the delay of public authorities, and sometimes built by the municipalites. Not infrequently do the towns spring into existence on piles over tide lands, whence they grow up the mountain side as the line of least resistance.

These tide land streets are indispensable to the public and are courted by the settlers along the beach. Only once in the history of Southeastern Alaska has condemnation proceeding been resorted to for the purpose of making room for a street on tide flats, and that was where the tract needed was actually occupied by two-story business blocks. In the absence of protests, the municipal authorities take it for granted that the construction of the street is welcome by all who live along the line of it.

The right to occupy the tide lands, except as against the government, has come to be looked upon and treated as a property right on the coast of Alaska

where streets intervene between the upland and deep water. The authorities cited above and relied upon by appellant have become a rule of property and millions of dollars are invested on the strength of them.

If the decision of the court in the case at bar be allowed to remain unchanged, it will tend to unsettle property rights to an astonishing degree and involve waterfront occupants in interminable litigation. Anyone who has a piece of upland will be obsessed with a craving for free access across the street to the ocean, and those in front of him will be at his mercy.

There is probably not one street of this character in Southeastern Alaska where the actual consent of the upland owner can at this time be proven, or where the proceedings of establishing the street by municipal authorities have been "regular" in the technical sense.

Respectfully submitted,

JOHN RUSTGARD,
Attorney for Appellant.

THIS IS TO CERTIFY that in my judgment this application for re-hearing is well-founded and it is not interposed for delay.

.....
Attorney for Appellant.